

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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April 9, 2007

Opinion 07-44

Fireworks in Hamilton County

QUESTIONS

1. 1955 Tenn. Priv. Acts Ch. 413 prohibits the sale of fireworks in Hamilton County. Does this act unlawfully restrict or impede commerce?
2. Chapter 413 also makes violation of the act a criminal offense roughly equivalent to a Class C misdemeanor. Does the General Assembly have the authority to authorize a county to make conduct criminal in one county that may not be unlawful in another county?
3. Assuming the answers to Questions 1 and 2 are no, does the City of East Ridge, a home rule municipality located in Hamilton County, have the authority to permit, by ordinance, or general bill with local application, the sale of Class C fireworks within the city limits of East Ridge, notwithstanding the prohibition in Chapter 413 for Hamilton County?

OPINIONS

1. No.
2. To the extent that 1955 Tenn. Priv. Acts Ch. 413 imposes criminal penalties more severe than, or covering conduct not subject to, Tenn. Code Ann. § 68-104-112(a)(4)(A), a court would probably find it represents an unconstitutional attempt to delegate legislative authority.
3. It could be argued that, since 1955 Tenn. Priv. Acts Ch. 413 contains a severability clause and also imposes civil penalties, those portions of the private act would remain enforceable even if a court rules the criminal provisions unconstitutional. In any case, Tenn. Code Ann. § 68-104-112(a)(4)(A) also bans the sale of Class C fireworks in counties with a population of more than 200,000. This is a general law. None of the exceptions in the statute apply to East Ridge. Nor is a home rule city authorized to enact an ordinance that contravenes a general state law on this issue. Tenn. Const. Art. XI, § 9. But this Office has concluded that the General Assembly could constitutionally pass legislation lifting the ban in East Ridge. Op. Tenn. Att’y Gen. 98-076 (April 6, 1998). No material changes have occurred since that opinion was issued. House Bill 589/Senate Bill 698, which has this result, is constitutionally defensible for the reasons discussed in that opinion.

ANALYSIS

1. Burden on Interstate Commerce

This opinion concerns the acts regulating fireworks in Hamilton County. As the request notes, 1955 Tenn. Priv. Acts Ch. 413 (“Chapter 413”) regulates the use of fireworks in Hamilton County. Chapter 413 applies in all counties of the State with a population of not less than 208,000 and not more than 212,000 under the 1950 federal census, or any subsequent federal census. Section 6 of that act requires its approval by a two-thirds vote of the County Council of Hamilton County. According to the official compilation of private acts, Chapter 413 was properly ratified according to its terms. Section 1 of the act makes it unlawful “for any person, firm or corporation to possess, store, use, manufacture or sell pyrotechnics, as herein defined” in the counties that fall within the specified population bracket. Section 1 also provides:

The term “pyrotechnics” as used in this Act shall be held to mean any sparkler, squibb, rocket, firecracker, Roman candle, fire balloon, flashlight composition used to obtain a visible or audible pyrotechnic display.

Section 2 declares pyrotechnics to be contraband subject to confiscation and destruction if found within the county. The statute also prescribes criminal penalties for violations. Section 4 exempts pyrotechnics used in public displays brought in from outside the county.

Tenn. Code Ann. §§ 68-104-101, *et seq.*, regulate the sale and use of fireworks. With a few narrow exceptions, the statutes generally ban the possession, use, or sale of pyrotechnics or fireworks other than “D.O.T. Class C common fireworks” or items that comply with the construction, chemical composition, and labeling regulations promulgated by the United States Consumer Product Safety Commission and permitted for use by the general public under its regulations. Tenn. Code Ann. § 68-104-108. Under Tenn. Code Ann. § 68-104-101(2),

The statutory scheme allows the retail sale of fireworks described in Tenn. Code Ann. § 68-104-108 upon obtaining a permit from the State Fire Marshal and subject to restrictions on shipment, storage, labeling, and display. Tenn. Code Ann. § 68-104-112 lists several unlawful acts in the sale and handling of fireworks. Subsection (a)(4)(A) provides in relevant part:

It is unlawful for any individual, firm, partnership or corporation to sell at retail any Class C common fireworks within any county of this state having a population greater than two hundred thousand (200,000), according to the 1980 federal census or any subsequent federal census, except in municipalities within such counties with a population of not less than six hundred (600) nor more than six hundred twenty

(620), according to such census, that permitted the sale of such fireworks before 1984[.]

Tenn. Code Ann. § 68-104-112(a)(4)(A). Hamilton County falls within the counties included in this provision. Subsection (4) contains two additional exceptions, neither of which applies to Hamilton County.

Tenn. Code Ann. § 68-104-116 generally provides that the statute does not affect the validity of any private act or of any city ordinance *further* prohibiting or restricting the sale or use of fireworks. Therefore, the provisions of Tenn. Code Ann. §§ 68-104-101, *et seq.*, were not intended to repeal the general ban on the use and sale of pyrotechnics in Hamilton County contained in Chapter 413.

The first question is whether these provisions regulating the sale and use of fireworks in Hamilton County unlawfully restrict interstate commerce. The Commerce Clause of the United States Constitution limits the power of states to discriminate against interstate commerce. U.S. Const., Art I, § 8. But courts have generally held that states have authority to regulate matters of legitimate local concern, even though interstate commerce may be affected. Where a law does not discriminate between interstate and intrastate commerce, the courts examine whether the burden on interstate commerce is excessive in relation to the purported local benefits and whether an alternative approach with a lesser impact on interstate activities is available. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715 (1981). Neither Chapter 413 nor Tenn. Code Ann. § 68-104-112(a)(4)(A) discriminates against interstate commerce. Clearly, Tennessee has a legitimate local interest in controlling the sale and use of fireworks within its borders. *See Consigned Sales Company, Inc. v. Sanders*, 543 F.Supp. 230 (W.D. Okl. 1982); *Cohen v. Bredehoeft*, 290 F.Supp. 1001 (S.D. Tex. 1968), *aff'd*, 402 F.2d 61 (5th Cir. 1968), *cert. denied*, 393 U.S. 1086, 89 S.Ct. 873, 21 L.Ed.2d 779 (1969) (upholding regulation on local fireworks sales). For this reason, neither of these provisions unlawfully restricts interstate commerce.

2. Constitutionality of Private Act Imposing Criminal Penalties

The second question concerns Section 3 of Chapter 413, which states:

That any person guilty of violating any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$50.00 and not more than \$400.00, or by confinement in the County jail for not less than thirty days and not more than eleven months and twenty-nine days, or by both such fine and imprisonment, in the discretion of the Court.

The private act is subject to the approval of a two-thirds vote of the Hamilton County Council. The question is whether the General Assembly may constitutionally delegate the authority

to a county legislative body to make criminal in one county conduct that may not be criminal in another county.¹

In 1984, the Tennessee Supreme Court found a private act prohibiting fireworks sales in Knox County to be constitutional. *Harwell v. Leech*, 672 S.W.2d 761 (Tenn. 1984). The general law then in effect allowed fireworks to be sold during certain times of the year. The Court found that the private act was in effect before the general law was passed and noted that the general law explicitly left private acts in place. The Court also found that the private act, which contained a population classification, was supported by a valid rational basis, because “[t]he likelihood of injury resulting from the use or misuse of fireworks is greater in a thickly populated county than in a county with a small population.” 672 S.W.2d at 764. For the same reasons, the 1955 private act applicable to Hamilton County is defensible against an equal protection challenge under the Fourteenth Amendment to the United States Constitution or Article XI, Section 8, of the Tennessee Constitution.

The legislation addressed in *Harwell* was not subject to local approval. As the request notes, however, the 1955 private act imposes criminal penalties and is subject to local approval. The efficacy of a criminal statute cannot be made to hinge on the outcome of an election or the approval of the county legislative body. *Jones v. Haynes*, 221 Tenn. 50, 424 S.W.2d 197 (Tenn. 1968). Thus, to the extent that 1955 Tenn. Priv. Acts Ch. 413 imposes criminal penalties more severe than, or covering conduct not subject to, Tenn. Code Ann. § 68-104-112(a)(4)(A), a court would probably find it represents an unconstitutional attempt to delegate legislative authority.

3. Authorizing Sale of Fireworks in East Ridge, Tennessee

The last question is whether, assuming 1955 Tenn. Priv. Acts Ch. 413 is unconstitutional, the City of East Ridge has the authority to permit, by ordinance, or general bill of local application, the sale of Class C fireworks within the city limits of East Ridge, notwithstanding the prohibition in Chapter 413 for Hamilton County. This private act contains a severability clause. 1955 Tenn. Priv. Acts Ch. 413, § 5. In addition to the criminal penalties, the act also authorizes the county sheriff and police to seize and destroy the materials banned under the act. The penalty of forfeiture is civil in nature. *United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135, 2147, 135 L.Ed.2d 549 (1996), *on remand on another issue*, 109 F.3d 1129 (6th Cir. 1997); *Stuart v. Tennessee Department of Safety*, 963 S.W.2d 28 (Tenn. 1998). For this reason, it could be argued that only the criminal provisions of the private act are unenforceable. Op. Tenn. Att’y Gen. 04-080 (April 29, 2004). In any case, Tenn. Code Ann. § 68-104-112(a)(4)(A) also bans the sale of Class C fireworks in counties with a population of more than 200,000. This is a general law within the meaning of Article XI, Section 9 of the Tennessee Constitution. *Civil Service Merit Board of the City of Knoxville v. Burson*, 816 S.W.2d 725 (Tenn. 1991) (a statute applicable to cities in counties with a population of 300,000 or more and not operating under the mayor-aldermanic form of government was not local

¹ As discussed in the answer to Question 1, Tenn. Code Ann. § 68-104-112(a)(4)(A) generally outlaws the sale of fireworks in any county with a population greater than 200,000 under the 1980 census or any subsequent census. Even if the private act were found to be unconstitutional, this statute would still ban fireworks sales in Hamilton County.

legislation; further, there was a rational basis for the classification as required under Article XI, Section 8, of the Tennessee Constitution). None of the exceptions in the statute apply to East Ridge. Nor is a home rule city authorized to enact an ordinance or a charter provision that contravenes a general state law on this issue. Tenn. Const. Art. XI, § 9. But this Office has concluded that the General Assembly could constitutionally pass legislation lifting the ban in East Ridge. Op. Tenn. Att’y Gen. 98-076 (April 6, 1998). No material changes have occurred since that opinion was issued. House Bill 589/Senate Bill 698, which has this result, is constitutionally defensible for the reasons discussed in that opinion.

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